STATE OF MICHIGAN

COURT OF APPEALS

JEAN E. IRWIN,

Plaintiff-Appellee,

v

LEO OLIVER GENNETTE,

Defendant/Third-Party-Plaintiff-Appellant,

v

RICHARD IRWIN

Third-Party-Defendant/Appellee.

UNPUBLISHED
November 18, 2008

No. 285398
Macomb Circuit Court
LC No. 2007-005456-DP

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant/Third-Party-Plaintiff (defendant) appeals as of right the trial court's order granting plaintiff's motion for summary disposition and determination of paternity. We affirm.

This case arises out of the paternity determination regarding Bret Irwin, plaintiff's son. Although born during plaintiff's marriage to third-party-defendant, Richard Irwin, plaintiff and Richard stipulated in their consent judgment of divorce that Richard was not Bret's biological father. Plaintiff subsequently initiated the instant paternity suit against defendant seeking an order of filiation and child support payments. A DNA test indicated a 99.999997 percent probability that defendant is Bret's biological father. On appeal, defendant argues that he has standing to assert that equitable estoppel prevents Richard from "revoking" paternity where Richard "held himself out" to be Bret's father before he and plaintiff divorced. We disagree.

This Court reviews de novo an appeal from an order granting summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d

468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth documentary evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). This Court employs a de novo standard of review to issues concerning the applicability of equitable estoppel and the equitable parent doctrine, as well as the issue of standing. *Killingbeck v Killingbeck*, 269 Mich App 132, 141; 711 NW2d 759 (2005).

The issue of standing to address such equitable claims was addressed by this Court in *Tanielian v Brooks*, 202 Mich App 304, 508 NW2d 189 (1993). There, a child was born during the Tanielians marriage to whom the husband was not the biological father. The Tanielians divorced and the divorce decree was later modified terminating the former husband's parental rights to the child. The child's mother filed a paternity action requesting the biological father pay child-support. The biological father then filed a third-party complaint alleging that the former husband was the "equitable" parent of the child and obligated to pay the child support requested in the mother's complaint against him.

This Court noted that "MCR 2.204(A)(1) provides in part that 'a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim.'" *Tanielian, supra* at 308. *Tanielian* opined that, "[e]ven if defendant were successful in demonstrating that under certain circumstances [the former husband] might have been held to be obligated to support [the child], it cannot be said that [the former husband] is a person who is liable to [the biological father] for any part of [the mother's] claim." *Id*. In other words, even if Richard were considered Bret's "equitable parent," Richard would not be liable to defendant; he would be liable to Bret. For this reason the *Tanielian* court concluded that, "[d]efendant cannot alter his child support obligations by finding another party upon whom that obligation might otherwise have fallen." *Id*.

Tanielian further noted that the biological father "has no standing to raise the issue of [the former husband's] potential support obligation." *Supra* at 309. This Court stated that the biological father "is not the proper party to raise this argument," as he "cannot 'appeal' from the judgment of divorce in which [the mother] and [the former husband] were parties." *Tanielian* is indistinguishable from the present case. We therefore conclude that defendant lacks standing to challenge Richard's support obligation.

Next, defendant argues that the trial court's failure to conduct a hearing on the issues of equitable estoppel and the equitable parent doctrine denied him procedural due process. We disagree. Our conclusion that defendant lacks standing to assert these equitable claims renders this issue moot—a party that lacks standing has no due process to be heard. Even if defendant had standing to assert these equitable claims, defendant's due process claims would nonetheless fail. "The United States and Michigan constitutions preclude the government from depriving a person of life, liberty, or property without due process of law." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605; 683 NW2d 759 (2004) US Const, Am XIV; Const 1963, art 1, § 17. "[D]ue process is a flexible concept, the essence of which is to ensure fundamental fairness. Procedure in a particular case is constitutionally sufficient when

there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005).

Defendant was not denied procedural due process. First, the consent judgment of divorce does not in any way incorporate defendant in the divorce proceedings. To the contrary, the divorce judgment specifically pertained to the determination that Richard was not Bret's father and indicated plaintiff's agreement to seek an order of filiation with respect to Bret. It is plaintiff's attempt to seek a filiation order and not her divorce action that brings defendant into litigation. Defendant has been given full and complete notice and a meaningful opportunity to be heard in this paternity litigation. Consequently, defendant has not been denied any procedural due process rights.[1]

Defendant next contends that plaintiff lacked standing to initiate this paternity action because the determination of Richard's paternity in the consent judgment of divorce was insufficient as a matter of law. We disagree. Whether a party has standing is reviewed de novo. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008).

"[T]o have standing to seek a determination of paternity, it is necessary for plaintiff to establish that a court 'has determined' that there was a child born or conceived during the marriage and that the child was not an issue of the marriage[,]" i.e., that the child was "born out of wedlock." *Barnes v Jeudevine*, 475 Mich 696, 703; 718 NW2d 311 (2006); MCL 722.711(a).[2] In *Opland v Kiesgan*, 234 Mich App 352, 359-360; 594 NW2d 505 (1999), this Court determined that an amended consent judgment of divorce sufficiently constituted a prior determination overcoming the presumption of legitimacy where the judgment stated that the court made a factual determination based on the parties' stipulation "that although they were married at the time [the child] was conceived, they were separated at that time and had no opportunity for any sexual relationship."

In contrast, the Supreme Court in *Barnes* found that the trial court failed to render a prior determination overcoming the presumption of legitimacy where the default judgment of divorce merely indicated that "there appeared to be no children born of or expected from the marriage." *Barnes*, *supra* at 704. In arriving at this conclusion, the Court explained: "a court determination under MCL 722.711(a) that a child is not 'the issue of the marriage' requires that there be an

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[1] Defendant also maintains that the trial court erred in refusing to allow additional discovery. However, summary disposition may be appropriate where further discovery does not stand a reasonable chance of uncovering further factual support for the opposing party. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1994). Therefore, given that defendant lacked standing to raise equitable estoppel and equitable parenthood, this argument fails.

[2] The Paternity Act defines a "[c]hild born out of wedlock" as "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a).

affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father." *Id*. at 705.

The judgment in this case satisfied the prior determination requirement regarding Bret's legitimacy. Although the court made no specific finding that plaintiff and Richard were separated at the time of Bret's conception, the court expressly questioned Richard during the divorce proceeding in regard to whether he was Bret's father. Additionally, the judgment was not entered by default. Rather, like *Opland*, the judgment reflected the Irwins' stipulation that the child was not an issue of their marriage. This determination settled any controversy between plaintiff and Richard in regard to Bret's legitimacy. Therefore, the consent judgment of divorce satisfied the prior determination requirement, and plaintiff had standing to bring the instant paternity action.

Finally, defendant asserts that the trial court erred in failing to appoint a guardian ad litem. We disagree. Because "[t]o whom custody is granted is a discretionary dispositional ruling," this Court reviews the court's decision whether to appoint a guardian ad litem for an abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994).

Defendant cites the Child Custody Act, MCL 722.21 *et seq*., in arguing that the trial court failed to appoint a guardian ad litem. Although this is a paternity action, the Paternity Act and Child Custody Act are to be considered *in pari materia*. *Sinicropi v Mazurek*, 273 Mich App 149, 157; 729 NW2d 256 (2006). "Statutes *in pari materia* are to be read and construed together as one law even if they were enacted at different times and without specific reference to each other." *Id*.

Defendant lacks standing to request a guardian ad litem given that he bases his request on grounds of equitable estoppel. Indeed, as noted *supra*, defendant lacks standing to assert this doctrine on Bret's behalf. In any event, his argument fails.

Regarding the appointment of a guardian ad litem, the Child Custody Act provides in relevant part: "If, at any time in the proceeding, the court determines that the child's best interests are inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the child[.]" MCL 722.24(2).[3] Defendant maintains that because Bret looked to Richard as his father and because the Irwins conspired to terminate Richard's obligations to Bret, "Bret's interests may have been compromised." However, there is no support in the record for these allegations. To the contrary, in attempting to obtain an order of filiation, plaintiff was acting in Bret's best interests. Therefore, the court did not abuse its discretion in denying defendant's request for a guardian ad litem.

Richard argues that because defendant's third-party complaint is frivolous, this Court should award attorney fees under MCR 7.216(C)(1)(a) and (2). This claim fails.[4] MCR

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[3] A guardian ad litem is defined as "an individual whom the court appoints to assist the court in determining the child's best interests." MCL 722.22(e).

[4] We note that the trial court previously denied Richard's request for sanctions on the grounds
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7.216(C) permits this Court on motion of a party under MCR 7.211(C)(8)[5] to assess damages, including attorney fees, for appeals "taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal." Here, Richard's request for attorney fees is improper because he raised this issue in his brief rather than in a separate motion under MCR 7.211(C)(8).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

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that defendant's third-party complaint was frivolous.

[5] MCR 7.211(C)(8) provides: "A party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule. A party may file a motion for damages or other disciplinary action under MCR 7.216(C) at any time within 21 days after the date of the order or opinion that disposes of the matter that is asserted to have been vexatious."